IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1710

THE STATE OF TEXAS,

Petitioner,

v.

UNITED STATES STEEL CORPORATION, ET AL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A)[1] is reported at 546 F.2d 626 (5th Cir. 1977). The Opinion of the District Court (Pet. App. C) is unreported.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.[2]

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[1] References to the Appendix of the Petition for Writ of Certiorari are designated "Pet. App. . . ." References designated as "R. App. . . ." are to the Appendix to this Brief in behalf of Respondents.

[2] The reference to "Petition" in this Brief refers to the Petition for Writ of Certiorari.

QUESTION PRESENTED

Whether the Court of Appeals was correct in reversing the District Court and ruling that the State of Texas must show, but had not shown, a compelling and particularized need to obtain grand jury transcripts from corporate (or partnership) defendants who severally had obtained, pursuant to Rule 16, Fed. R. Crim. P., such transcripts in defense of a separate criminal action against them; whether this involves an important question of federal law which has not been settled by this Court; and whether the Fifth Circuit has rendered a decision in conflict with the decision of another Court of Appeals within the meaning of Rule 19 of the Rules of the United States Supreme Court.

STATEMENT

Respondents concur generally with Petitioner's Statement of the Case. Respondents believe, however, that certain matters as presented by Petitioner require clarification, and certain other matters omitted by Petitioner need to be set forth for the Court.

In the Petition, the State of Texas refers simply to the transcripts being "delivered" by the Government to certain corporate defendants (Petition p. 3). In fact, after Respondents had moved for the transcripts under Rule 16, Fed. R. Crim. P., the Government, by agreement reflected in the Order of Judge Allen Hannay in *United States of America* v. *Armco Steel Corp., et al,* Criminal Action No. 73-H-336 (R. App. A), released *severally*[3] to each Respondent the grand jury testimony of employees or former employees of each such Respondent. This was accomplished on or about February 1, 1974, by letter from the Depart-

[3] Italicizing throughout this brief, has been added by Respondents for emphasis, unless otherwise indicated and except for styles of cases or words in foreign languages.

ment of Justice to the attorneys for each Respondent, which stated in pertinent part: "the Government discloses herewith, to defendant [name of] Company, *and to no other person,* Xerox copies of the recorded grand jury testimony of the following persons: ***" (R. App. B).[4] No claim was made or proof was offered by the State of Texas to indicate that there had been any exchange of these grand jury transcripts among any of the defendant companies or their attorneys, and as Respondents have advised the Courts below, and now advise this Court, neither the transcripts nor the contents thereof has been exchanged among Respondents or their attorneys.

Petitioner refers in the Petition to the State's "attempted" deposition of Mr. Nance and Mr. Rinn, and their refusal to answer questions on grounds of self-incrimination, and attempts to position this paragraph in the Petition as a predicate to its request for grand jury transcripts (Petition pp. 3-4). The Petitioner has failed to point out, however, that at the time of these depositions, the criminal case in which these two individual employees were defendants was *not* concluded, these individuals having not yet been sentenced at that time. Petitioner further neglects to state that these two employee-defendants *had not testified* before the grand jury whose transcripts are at issue here.

With respect to matters leading up to this interlocutory appeal, Respondent offered more than a simple "refusal to produce" the grand jury transcripts sought by the State (Petition p. 4). Respondents Laclede Steel Company and Structural Metals, Inc. filed responses, motions for pro-

[4] Respondents have reproduced one such letter in the Appendix to this Brief. Identical letters were sent to each Respondent with the respective and separate packages of employee testimony.

tective order and supporting legal memorandum (which were joined in by other defendants) setting forth in detail defendants' objections to forced disclosure of grand jury transcripts for general discovery purposes and asking for other relief.

By Order of June 3, 1976, the District Court ordered the production of the grand jury transcripts. The Order also denied most of the protective and other relief alternatively requested by Respondents. The District Court's only reference to "need" for the discovery was a statement of its "opinion . . . that Plaintiff has shown a compelling need if only by virtue of the fact that the testimony is in the possession of Defendants" (Pet. App. C-2).

In considering Respondents' appeal of the Order, the Court of Appeals framed the issue as "whether the State of Texas must show a particularized need to obtain the grand jury documents from the defendants and, if so, whether it has made that showing in this case." *Texas* v. *United States Steel Corp.*, 546 F.2d 626, 628 (5th Cir. 1977) (Pet. App. A-3). Responding to the State's contention that inasmuch as the corporate defendants had the transcripts in their several possession, normal discovery rules should apply, the Court of Appeals pointed out that a reason for grand jury secrecy is "the desire to create a sanctuary, *inviolate to any intrusion* except on proof of some special and overriding need, where a witness may testify, free and unfettered by fear of retaliation." *Id.* at 629 (Pet. App. A-6). Finally, in conclusion, the Court of Appeals held: "The general circumstance that another party has his own or his employee's transcript in his possession does not, standing alone, establish particularized need sufficient to overcome the need for grand jury secrecy. Texas must draw a finer bead." *Id.* at 631 (Pet. App. A-9).

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ON THE ISSUE OF DISCOVERABILITY IN A CIVIL PROCEEDING OF SECRET GRAND JURY TRANSCRIPTS WAS CORRECT UNDER THE FACTS OF THE CASE.

The decision and opinion by the Court below, under the facts before it, was clearly in accordance with Rule 16 and Rule 6(e), Fed. R. Crim. P., relevant case authority, and, more particularly, this Court's opinion on the discoverability in civil proceedings of grand jury transcripts in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958). The Court of Appeals below correctly recognized the "indispensable secrecy of grand jury proceedings", and that such secrecy must not be broken by a court order requiring disclosure without there having been a showing of compelling and particularized necessity, citing and quoting from *Procter & Gamble, supra.* The Fifth Circuit properly declared that under these teachings it was not free to adopt "such broadest rule of automatic discovery as that for which Texas contends".

This Court in *Procter & Gamble* and the Fifth Circuit Court in its prior decision in *Allis-Chalmers Manufacturing Co.* v. *City of Fort Pierce,* 323 F.2d 233 (5th Cir. 1963), had recognized that compelling need to use *particular portions* of grand jury transcripts of a witness might sometimes be shown where it was needed to "impeach a witness, to refresh his recollection, to test his credibility and the like". The State of Texas, however, in the factual setting here made no attempt to show any such compelling and particularized need, and presented no evidence in support of its motion to compel production.

At the time of its requests for production and motions to compel production the State of Texas had not taken or scheduled the taking of a deposition of any person who had testified before a grand jury, and no trial date was scheduled. The State's *sole ground* for claiming a right to disclosure of the secret grand jury transcripts was simply that transcripts of their respective employees-witnesses were in the possession of the corporate defendants (who had rightfully and severally obtained the transcripts of their own employees' testimony under Rule 16, Fed. R. Crim. P., in connection with such companies' defense of a criminal action). The State did *not* limit its request to any particular witness or to any particular portion of the transcript. The Fifth Circuit described the State's position as "whole hog or none", and, there being no showing of or effort to show particularized necessity to overcome the need for grand jury secrecy, such Court properly denied disclosure. This was in complete accord with this Court's rejection in *Procter & Gamble* of a similar argument that possession alone, or even possession and use of grand jury transcripts during a civil action, which were acquired by a party or their counsel in a prior criminal action (there the Justice Department), would establish compelling and particularized need.

The Fifth Circuit in the present case noted that requests for disclosure in civil actions of grand jury transcripts involved the Court in a "delicate task" of balancing the policy requiring the secrecy of grand jury proceedings with the policy favoring civil discovery. The Court declared, however, that such balance could not be resolved against needed grand jury secrecy, and in favor of civil discovery, *unless* a civil litigant established compelling and particularized need therefor. As the State of Texas had shown no such need, and made no effort to show

such need, there could be but one result, which the Fifth Circuit correctly reached in this case.

In the Fifth Circuit's decision and opinion, no absolute bar to civil discovery of portions of grand jury testimony was announced, no failure to balance the need for disclosure against the need for grand jury secrecy was evidenced, no sweeping insulation of grand jury testimony from discovery under significantly necessitous circumstances was declared. That the ruling denying access was unsatisfactory to Petitioner does not justify the charge that the Fifth Circuit "declined to pay more than lip service" to the balancing test or that it "has taken a rigid approach that does not look to reality * * *" (Petition pp. 10-11), and such charges do not meet the criteria which would justify grant of certiorari.

II.

REFUSAL BY THIS COURT TO CONSIDER THE QUESTION DECIDED BY THE COURT OF APPEALS FOR THE FIFTH CIRCUIT WOULD BE PROPER INASMUCH AS NO QUESTION OF SUBSTANTIAL IMPORTANCE EXISTS WHICH HAS NOT BEEN RESOLVED BY THIS COURT IN PRIOR DECISIONS.

The determination of whether, and to what extent, any civil discovery of secret grand jury transcripts will be permitted is one in the first instance for the exercise of discretion by the trial court on a case-by-case basis, depending on the particular facts in each case. The function of the Court of Appeals then is, of course, to exercise appellate supervision in determining whether the trial court gave proper sanctity to the policy of grand jury secrecy and properly exercised the "delicate task" referred to above of balancing such policy against the need for reasonable discovery of evidence in civil proceedings.

Here the trial court had before it *no* evidence of compelling and particularized need, so the task of the Court of Appeals under the facts of this case was a relatively easy one with an inevitable result.

If a clear and meritorious need for discovery should arise in future preparation for trial or actual trial of this case, the Fifth Circuit's opinion presents no obstacle to a fresh approach to the trial court for a proper balancing of special and compelling need for discovery against traditional need for secrecy — which shows how little is at stake here for the Petitioner, State of Texas.

The State of Texas, by narrowly drawing the issue stated in its Petition to this Court (pp. 5 and 6), gives the incorrect impression that this Court has not given adequate guidance and standards concerning civil discovery of grand jury transcripts; clearly such is not the case.

The decision of this Court which gives such guidance and standards is *Procter & Gamble*. There, as here, one of the reasons the District Court ordered disclosure was because one of the civil litigants had possession of grand jury transcripts and such transcripts would be useful to the opposing parties in preparation for trial. The other grounds stated by the District Court in *Procter & Gamble*, 19 F.R.D. 122 (D.N.J., 1956) — that the party possessing the transcripts was using them in preparation for the civil trial and that disclosure was the only way the opposing parties could get information — were not established or sought to be established by the State of Texas in the present case or found by the District Court below. In all events this Court rejected such grounds, stating as follows:

> "At the same time, we start with a long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts. See United States v. Johnson, 319 U.S. 503, 513; Costello v. United States, 350 U.S. 359, 362. The reasons are varied. One is to encourage all witnesses to step forward and testify freely without fear of retaliation. The witnesses in antitrust suits may be employees or even officers of potential defendants, or their customers, their competitors, their suppliers. The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow. This 'indispensable secrecy of the grand jury proceedings,' United States v. Johnson, supra, 319 U.S. at page 513, must not be broken except where there is a compelling necessity. There are instances when that need will outweigh the contervailing policy. But they must be shown with particularity."[5]

This Court reaffirmed *Procter & Gamble* and the standard requiring a showing of particularized need "which outweighs the policy of secrecy", in *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395 (1959). There, in a criminal setting, this Court rejected defendants' assertion of an absolute right to grand jury transcripts merely because a trial witness had testified before the grand jury.

None of the factors mentioned by Petitioner as bases for reevaluating the established standard of compelling and particularized need (pp. 7, 8, 9 of the Petition) demonstrates any lessening of the need for the sanctity and secrecy of grand jury proceedings or justifies any lessening of this standard.

The 1975 amendment to Rule 16, Fed. R. Crim. P., referred to by Petitioner, clarified the particular circumstances under which a company criminal defendant might obtain transcripts of their own employees' grand jury testimony in order to defend themselves in the criminal

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[5] This language from *Procter & Gamble* is quoted and followed by the Fifth Circuit in the *Texas* case (Pet. App. A-8), 546 F.2d 626, 630.

action. Such very limited discovery by a participant in a criminal action does not alter the need for the secrecy of grand jury proceedings to be protected against other discovery for which there is no compelling need. This Court has indicated in *Procter & Gamble* that fear by a grand jury witness of retaliation may involve employers, suppliers, competitors or customers. Future grand jury witnesses who knew their testimony might become available to any of such entities might not testify freely. Also, as indicated by the Fifth Circuit Court below, company employees appearing as grand jury witnesses are in the usual case spokesmen for, and not hostile or disaffected toward, their employer (and Petitioner made no showing regarding this as to any grand jury witness). Thus, such a witness would not fear retaliation by his employer in possession of a transcript of his grand jury testimony, but might fear retaliation by others who he knew might be able to obtain the transcripts.

It is further appropriate to observe that the ruling here sought by the State of Texas, that mere possession of a transcript by a company for use in its defense against criminal charges would make it discoverable by civil antitrust plaintiffs, would wrongfully burden and chill the company's right to defend itself against criminal charges, and, as the Fifth Circuit said in this case, "automatic discoverability in civil proceedings — would restrict unduly the corporation's use of the criminal defense tool which Congress saw fit to grant in Fed. R. Crim. P. 16(a)(1)(A)," *Texas, supra* at 630 (Pet. App. A-7). Additionally such judicial action would nullify Congressional intent clearly and recently expressed on this very subject matter as hereinafter set forth.

Petitioner complains about possible inability to obtain answers to some deposition questions because of assertions

of Fifth Amendment privilege by persons who testified before the grand jury under use immunity (Petition p. 8). This has no real significance here. First, there is nothing in the record indicating any difficulty of Petitioner in obtaining deposition testimony from persons who testified (with or without use immunity) before the grand jury which returned the indictment in the criminal action. The two persons, who the record reflects asserted the Fifth Amendment before the District Court ruled, had not testified before the grand jury. Second, there was no showing by Petitioner that it could not obtain the information claimed to be needed by sources other than grand jury transcripts, and in all events this Court rejected in *Procter & Gamble* inability to obtain information by means other than through grand jury transcripts as a basis for disclosure. Of course, if a witness asserts the Fifth Amendment in response to a particular inquiry, there is no testimony by such witness on this subject matter as to which any grand jury testimony might be useful for impeachment, refreshing of recollection or testing credibility.

Petitioner refers to recent amendments to the Clayton Act, 15 U.S.C.A. §15c-15h (Supp. 1977), authorizing State Attorneys General to bring actions on behalf of consumers under the federal antitrust laws, which amendments were a part of the Act commonly known as "The Hart-Scott-Rodino Antitrust Improvements Act of 1976". Petitioner refers to Section 15f(b) of such amendments which authorized the Attorney General of the United States to make available to the States' Attorneys General investigative files or other materials "to the extent permitted by law." This provision, however, gave the States' Attorneys General no greater right of access to grand jury transcripts than exists under the established law as declared by this Court in *Procter & Gamble,* requiring a showing of com-

pelling and particularized need before such access could be had. That Congress felt that express legislation would be required to alter such standard of access is evidenced by the majority and minority Committee reports during consideration by both Houses of Congress of the following portion of the Senate version of the Antitrust Improvement Act which was added to House Bill HR 8532 (and finally rejected, see R. App. C, showing that such language was ultimately stricken):

> "(1) *Any person that institutes a civil action under this Act* may, upon payment of reasonable charges therefore and *after completion of any criminal proceeding* instituted by the United States in which a defendant enters a plea of guilty or nolo contendere and arising out of any grand jury proceeding, inspect and copy any documentary material produced by such defendant in *and the transcript of the testimony of such defendant or any other officer, director, employee, or agent of such defendant in such grand jury proceeding concerning the subject matter of such person's civil action.* Any action or proceeding to compel the grant of access under this subsection shall be brought in the United States district court for the district in which the grand jury proceeding occurred. The court may impose conditions upon the grant of access and protective orders that are required by the interests of justice." (emphasis added)

Such language was, after debate and objection by the Administration, rejected and eliminated by Congress, thus further evidencing the legislative intent that the law relating to access to grand jury transcripts remain unchanged, and that particularized need must be shown to justify breach of grand jury secrecy, even though Rule 16 had been amended in 1975 to codify specifically the court approved right of corporate defendants to obtain their employees' grand jury transcripts. Respondents recognize,

of course, that this Court is not bound by this indication of Congressional interpretation of what the law is and of what it ought to be, in this area of grand jury secrecy, but it may be of some persuasive value in this Court's exercise of "sound judicial discretion" (Rule 19 language) while determining whether to grant certiorari. It should, furthermore, counterbalance the suggestion by Petitioner that the passage of this Act with its *parens patriae* provisions is a significant fact change since *Procter & Gamble* was decided, which might require a more liberal use of grand jury transcripts in civil proceedings.

III.

THERE IS NO DIRECT CONFLICT BETWEEN THE DECISION OF THE FIFTH CIRCUIT HEREIN AND THE DECISIONS OF THE SEVENTH AND NINTH CIRCUITS WITHIN THE MEANING, PURPOSE AND INTENT OF RULE 19 OF THE RULES OF THE UNITED STATES SUPREME COURT.

It is significant that the Petitioner, State of Texas, seeks this Court's review, by exercise of its "sound judicial discretion" (Rule 19) to grant or withhold review, not because of a conflict of *decisions* by two Courts of Appeals (the requirement of this Court's Rule 19(b)), but because of an alleged conflict of "approach", or emphasis, or judicial attitude, in applying this Court's *Procter & Gamble* guidelines to varying fact situations existing in the *Texas* case and *Illinois* v. *Sarbaugh*, 552 F.2d 768 (7th Cir. 1977).[6] In short, Petitioner would construe this Court's certiorari review, based on conflict of decisions by the Courts of

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[6] Petition for Writ of Certiorari to the Seventh Circuit Court of Appeals was filed on or about May 25, 1977, by J. L. Simmons Company, Inc., et al, (No. 76-1661), seeking a review by this Court in the *Sarbaugh* case, 45 U.S.L.W. 3779.

Appeal, as one utilized to demand uniformity of judicial writing, uniformity of opinion, uniformity and even identity of "approach" to any given controversy, — even in the area of pretrial discovery. In this area this Court historically has been willing to restrain its judicial oversight in recognition of the need for individual rulings by individual Courts at a lower level, which are closer to the variants of each individual fact situation, and to the individualistic and unique needs of each pending trial.

In short, if the time-honored sanctity of secrecy of grand jury testimony is acknowledged, — as it was in the *Texas* case and in *Sarbaugh*, — and if there is recognition of the principle that particularized need and compelling necessity may occasionally override such secrecy in judicial balancing of conflicting needs — a recognition granted by both the Fifth and Seventh Circuits in the *Texas* and *Sarbaugh* cases, — it would appear from available guidelines that this Court has no compelling interest in requiring that general disclosure of grand jury testimony be endorsed, or the reverse, that absolute secrecy of same remain inviolate, by judicial decree in both cases. By application of similar principles to different fact situations, and involving parties differently situated (i.e., Department of Justice in *Sarbaugh*, and corporations which had obtained the transcripts as tools to defend against criminal charges in the *Texas* case), opposite results on disclosure of grand jury testimony in civil litigation may be reached without creating the kind of "real and embarrassing conflict of opinion and authority"[7] which has historically been the requisite for arousing and invoking this Court's "conflict" review in certiorari proceedings. This Court has in effect declared

[7] Standard set forth in *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955) quoting statement of Mr. Chief Justice Taft in *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387 (1923).

that in such fact situations as are here presented there shall be a judicial "balancing" of need for secrecy versus need for disclosure (*Procter & Gamble* etc.), and by hypothesis such procedure cannot be required to result in discovery, or in non-disclosure, in *all* cases. This Court's certiorari review based on "conflict" between Courts of Appeal is clearly not invoked by the results of these two cases, or these two opinions, in which the basic principles of grand jury secrecy and standards for selective disclosure are uniformly acknowledged, even though variant results are achieved on the basis of application by two Courts of generally accepted principles to somewhat different fact situations.

In his response Sarbaugh, the Government attorney, from whom the transcripts were sought in the *Sarbaugh* case, did not object to such production, while in the *Texas* case the Justice Department in proceedings before the District Court had filed an objection in the District Court to any production of grand jury transcripts of testimony. The State of Texas did represent to the Court of Appeals that the Justice Department subsequently did not object to the attempt of the State to obtain disclosure of transcripts in the possession of Defendants, but this was never confirmed by the Department of Justice and this description of the Justice Department's position was challenged by Respondents, and the Justice Department took no part in the appeal.

Another distinguishing feature was the fact, given significance by the Court in *Sarbaugh*, that at least one of the co-defendants had exchanged grand jury transcripts with another co-defendant, while in the *Texas* case the Defendants had avoided any possible question of waiver of confidentiality by at all times severally retaining possession of the transcripts of their own respective employees, and not disclosing them to any others.

A further distinguishing factor given paramount importance by the Court in the *Sarbaugh* case is that the Seventh Circuit based its ruling on a situation where prior grand jury witnesses were scheduled to be called to give testimony at trial or by deposition on matters about which they had testified before the grand jury. The Seventh Circuit seems to ignore the possibility that, after the secret grand jury transcript of a witness scheduled to be deposed is delivered to the deposing party, the deposition might be cancelled for various good faith reasons or the witness might legitimately refuse to testify (e.g. because of risk of self-incrimination) so there could conceivably be no testimony to impeach, contradict or refresh.

The State of Texas apparently would seek to obtain the grand jury transcripts without demonstrating any compelling and particularized need to use such transcripts, even under *Sarbaugh's* prescribed standard. In the *Texas* case the State requested disclosure of *all* grand jury transcripts in the possession of the Defendants without regard to any particular witness scheduled to give testimony either at trial or by deposition. In fact, the State contended before the District Court and the Court of Appeals that a showing of particularized need was unnecessary and no such showing was made. While two witnesses had been deposed by the State when it filed its Motion to Compel Production, neither of such witnesses had testified before the grand jury, and the District Court in its decision took no cognizance of any depositions, scheduled or otherwise.

The Fifth Circuit Court of Appeals, in effect, recognized that the State of Texas sought wholesale, general discovery of grand jury transcripts, in a manner which wholly failed to meet the particularized need test, and which, if allowed, would not only unduly burden the rights of a corporate defendant in a criminal case, but would also impair the

function of "the grand jury as a public institution • • • if those testifying today knew that the secrecy of their testimony would be lifted tomorrow." *Texas,* 546 F.2d 626, 630 (Pet. App. A-8), quoting *Procter & Gamble.*

An analysis of *U. S. Industries, Inc.* v. *United States District Court,* 345 F.2d 18 (9th Cir. 1965), cert. denied, 382 U.S. 814 (1965), cited by Petitioner, reveals a similar lack of "conflict" in decisions between the Ninth Circuit and the Fifth Circuit.

The Ninth Circuit in *U. S. Industries* reiterated the importance of insuring untrammeled disclosure of facts by future grand jury witnesses. *Id.* at 22 (Pet. App. E-11). To this end, the Court of Appeals took it upon itself to conduct an *in camera* inspection of the government's presentencing memorandum involved in that case (rather than grand jury transcripts) noting that such "policing" would ordinarily be undertaken by the trial court. The Court of Appeals then deleted portions of the document which it "deemed necessary in respect to the policy consideration behind the rule of secrecy of grand jury investigation." *Id.* at 23 (Pet. App. E-11). This approach followed by the Court in *U. S. Industries* clearly does not provide any "real and embarrassing conflict" with the decision of the Court of Appeals in this case.[8]

That two District Courts and one Court of Appeals in Illinois and one District Court in Arizona (Petition, p. 13)

[8] The Petition For Writ of Certiorari in the *U. S. Industries* case (October Term, 1964, No. 113), which was denied as indicated above, argued that such opinion was inconsistent with *Procter & Gamble.* That the different approach in *U. S. Industries* could co-exist with *Procter & Gamble,* so that this Court in its discretion determined that it was inappropriate to grant review, is persuasive that the different approaches of the Fifth and Seventh Circuits may also co-exist under *Procter & Gamble.*

have "balanced" the conflicting principles of grand jury secrecy against need for discovery, and then found that the need for discovery should prevail on the particular facts before them, provides no irreconcilable and significant conflict with the Fifth Circuit's conclusion in support of grand jury secrecy on the facts before it in the *Texas* case. As Respondents understand our Federal judicial system, discretionary review by certiorari is not utilized to produce rigid conformity and complete uniformity in judicial writing and judicial approach, and particularly is not utilized to overturn reasonably discretionary rulings in the pretrial stages of litigation by District Courts and Courts of Appeal so long as there is reasonable adherence to basic judicial principles enunciated on the particular subject by this Court. Respondents are confident that this Court is not inclined to declare that grand jury secrecy may *never* be invaded, or, conversely, that discovery in civil proceedings of grand jury transcripts must always be granted whenever it is shown that a transcript has lawfully and rightfully passed into the hands of a third party. The *Texas* and *Sarbaugh* decisions and the related cases cited by Petitioner (Petition p. 13) therefore provide no "special and important reasons" (Rule 19) or "real and embarrassing conflict" (authorities *supra*, footnote 7) which would require this Court to undertake a review on certiorari.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should not issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit and the Petition for Writ should be denied.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA
v.
ARMCO STEEL CORPORATION, ET AL.
CR. No. 73-H-336

ORDER:

The Motions pending before the Court herein are disposed of as follows.

* * * * *

3. The Motions for Inspection of the Grand Jury Minutes are denied as no particularized need for same is demonstrated by the record save as provided in Section number 6 of this Order.

4. In respects other than the legitimate secrecy here of the grand jury proceedings, the Motions for Discovery Inspection and Copying are granted to the extent agreed to by the government in its response thereto.

5. Apart from the secrecy here of the grand jury proceedings, and upon the representations of the government in its response, the Motions for production of alleged specific exculpatory evidence are denied subject to the requirements of the Jenck's Act, Title 18, USCA, Section

3500, and the continuing duty of the government generally not to supress *bona fide* exculpatory evidence and its risk in the premises. Brady v. Maryland, 373 U.S. 83.

6. Discovery items to which the government has agreed will be provided the Defendants at least thirty (30) days prior to trial, *including the grand jury testimony of certain employees of certain defendants as expressly agreed by the government* in its* Response filed January 10, 1974. See: Rule 16(a)(3).

• • • • •

It is so ORDERED.

The Clerk will notify Counsel.

Done in Houston, Texas on this the 12th day of January 1974.

/s/ ALLEN B. HANNAY
United States District Judge

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* Explanatory note by Appellants: The agreement of the Government referred to by Judge Hannay was reflected in the Government's Memorandum in Opposition to Motions for Discovery and Inspection in the Criminal Action, wherein the Government agreed that "corporate defendants in criminal antitrust proceedings should be able to discover the relevant grand jury testimony only of present or former corporate personnel" who were in a position to legally bind the corporation with respect to the type of business covered by the criminal indictment, and advised the Court that "A copy of the grand jury transcript of each such person so situated will be produced to the *respective* defendant employer." This production of these transcripts to various of the respective defendants then took place.

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the Division Indicated and Refer to Initials and Number

TEK:JCF:WLW
60-138-168

January 31, 1974

Thad T. Hutcheson, Esquire
Hutcheson, Taliaferro & Grundy
Attorneys at Law
Tenneco Building
Houston, Texas 77002

Re: United States v. Armco Steel Corporation, et al., (Criminal Action No. 73-H-336)

Dear Mr. Hutcheson:

In further response to defendants' motions for discovery and inspection of defendants' grand jury testimony and pursuant to the authority of Rule 20 E of the Local Rules of the United States District Court for the Southern District of Texas, the government discloses herewith, to defendant Laclede Steel Company, and to no other person, xerox copies of the recorded grand jury testimony of the following persons:

(Names of employees or former employees of Laclede Steel Company and unrelated final paragraph deleted by this Respondent)

Sincerely yours,

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

By: Wilford L. Whitley, Jr.
Attorney, Department of Justice

94TH CONGRESS
2D SESSION

H. R. 8532

IN THE SENATE OF THE UNITED STATES

JUNE 11 (legislative day, JUNE 3), 1976

Ordered to be printed with the amendment of the Senate

(Strike out all after the enacting clause and insert the part printed in italic. Amend the title)

AUGUST 24, 1976

House agrees to the Senate amendments with an amendment

(Strike out all italic of the action of the Senate of June 10 (legislative day of June 3), 1976 and insert the House amendment in roman)

SEPTEMBER 8, 1976

Senate agrees to the House amendment to the Senate amendment with an amendment

(In lieu of the roman text of the House amendments of August 24, 1976, insert the Senate amendment as printed in italic)

SEPTEMBER 8, 1976

Ordered to be printed with the amendment of the Senate

AN ACT

To amend the Clayton Act to permit State attorneys general to bring certain antitrust actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

~~That this Act may be cited as the "Antitrust Procedures Improvements Act".~~

~~SEC. 2. The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730), is amended by inserting immediately after section 4 the following new section:~~

~~duced in and the transcripts of such grand jury proceedings. While such materials are in the possession of the Commission, the Commission shall be subject to any and all restrictions and obligations placed upon the Attorney General with respect to the secrecy of such materials.~~

~~"(l) Any person that institutes a civil action under this Act may, upon payment of reasonable charges therefor and after completion of any criminal proceeding instituted by the United States in which a defendant enters a plea of guilty or nolo contendere and arising out of any grand jury proceeding, inspect and copy any documentary material produced by such defendant in and the transcript of the testimony of such defendant or any other officer, director, employee, or agent of such defendant in such grand jury proceeding concerning the subject matter of such person's civil action. Any action or proceeding to compel the grant of access under this subsection shall be brought in the United States district court for the district in which the grand jury proceedings convened. The court may impose conditions upon the grant of access and protective orders that are required by the interests of justice.".~~

~~SEC. 20. (a) The provisions of this title, except as provided in subsection (b), shall be effective on the date of enactment of this Act, and the provisions providing for the production of documents or information may be employed~~